No. 89-1416

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

AIR COURIER CONFERENCE OF AMERICA,
Petitioner,
v.
AMERICAN POSTAL WORKERS UNION, AFL-CIO, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION OF RESPONDENTS AMERICAN POSTAL WORKERS UNION, AFL-CIO, AND NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, TO DISMISS THE WRIT FOR LACK OF JURISDICTION, AND BRIEF IN SUPPORT

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INTRODUCTION

Respondents American Postal Workers Union, AFL-CIO ("APWU") and National Association of Letter Carriers, AFL-CIO ("NALC"),[1] pursuant to Rule 21 of the Court, respectfully request the Court to dismiss the writ of certiorari for lack of jurisdiction, in particular, because petitioner Air Courier Conference of America ("ACCA") lacks standing to petition for the writ.

In *Diamond v. Charles*, 476 U.S. 54 (1986), the Court specifically held that where, as here, a defendant de-

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[1] These respondents are sometimes collectively referred to as "the Unions" or "Union respondents."

clines to seek review in this Court of an adverse decision of the court of appeals, a party which had intervened on the side of the defendant must independently establish his standing in this Court. ACCA, a trade association the members of which engage in the practice of international remailing, was permitted to intervene by the district court under Rule 24(b), F.R. Civ. P., in support of the defendant U.S. Postal Service's final rule suspending the Private Express Statutes ("PES")[2] for international remailing. However, as *Diamond* makes clear, because the Postal Service has not petitioned for a writ of certiorari, there is no longer a case or controversy over the validity of the final rule. Furthermore, ACCA has never demonstrated that its members " 'personally [have] suffered some actual or threatened injury' " as required by *Diamond*, 476 U.S. at 62 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)). Rather, ACCA has consistently taken the position that its members' activities did not violate the PES under preexisting regulations. Moreover, the Department of Justice—which has the exclusive authority to prosecute violations of the PES—has assured ACCA members that they will not be prosecuted or be the subject of other court actions under existing regulations.[3] Accordingly, the Court is without jurisdiction in this case.

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[2] The PES are found at 39 U.S.C. 601-606 and 18 U.S.C. 1693-1699, 1729. These statutory provisions collectively give the Postal Service the exclusive right to carry letters over postal routes, unless such carriage is permitted by a statutory exception, or unless the operation of the PES is suspended by the Postal Service pursuant to 39 U.S.C. 601(b).

[3] As ACCA stated in its petition: "Before the Postal Service proposed its 1985 anti-remail rule, it had sought Justice Department action against remailers. The Justice Department declined to prosecute." Pet. at 9.

STATEMENT OF THE CASE

A statement of the case appears in the petition, as well as the joint opposition of the Union respondents and that of the Acting Solicitor General on behalf of the U.S. Postal Service. It will not be repeated here except insofar as it is necessary to explain this motion.

The issues presented to this Court by the petitioner involve both the validity of the final rule suspending the PES for so-called "international remailers" and the question whether respondent Unions' claims fell within the relevant "zone of interest," thus permitting them to seek judicial review of the final rule. The court of appeals accurately summarized the case as follows (Pet. App. 2a-4a):

> In 1979, the Postal Service exercised its authority under § 601(b) to suspend the PES for the carriage of extremely urgent letters, otherwise known as express mail or overnight service. See 44 Fed. Reg. 61, 181 (Oct. 24, 1979). As a result, private mail services began to rely on the urgent letter suspension to support the practice of "international remailing," or carriage of letters overseas for deposit into foreign postal systems—thus allowing users of the service to bypass completely the U.S. Postal Service. In October of 1985, the USPS announced its intention to amend the urgent letter suspension to limit sharply its applicability to international remailing. See 50 Fed. Reg. 41,462 (October 10, 1985). This proposal was greeted with massive opposition from the business community and the disapproval of several members of Congress and senior executives in the Reagan Administration. Opponents argued primarily that preventing private remailers from offering inexpensive, speedy service would jeopardize the ability of American companies to compete for business abroad.
>
> In March of 1986, the Chairman of the Postal Service's Board of Governors, John McKean, an-

nounced the USPS's intention to initiate another rulemaking proceeding "to remove the cloud that now hangs over the international remail services and preserve the benefits of desirable competition between the Postal Service and private companies." The USPS withdrew its earlier proposal and began considering whether to suspend the PES to allow international remailing. See 51 Fed. Reg. 9652 (March 21, 1986). Two rulemaking notices to this effect and a public meeting produced little additional factual information.

On August 20, 1986, the USPS published a final rule suspending the PES to permit unrestricted international remailing. See 51 Fed. Reg. 29,636. The regulation allows private carriers to deliver mail from the United States directly to foreign postal systems, bypassing the USPS, without meeting certain cost conditions that applied under the urgent letter suspension. See 39 CFR § 320.8 (1988). Responding to the Unions' complaint that the record was inadequate to support a "public interest" finding, the USPS stated:

> The Postal Service . . . sought . . . to obtain precise and detailed information regarding the level of services provided by remailers, and the benefits which [their] customers . . . derive. It may well be, however, that because of the diverse character of the remail industry and the relatively recent development of remailing, the comprehensive information we had hoped to receive to supplement the essentially anecdotal information, which was furnished to us, is not available. Nonetheless, the Postal Service has compiled a record which appears to demonstrate the existence of a public benefit and to support the suspension.

51 Fed. Reg. 29,637 (Aug. 20, 1986). Indeed, in its final notice of proposed rulemaking the USPS had emphasized the sketchy nature of the factual record, referring to the "anecdotal character" of tables

> charting relative delivery times, the "imprecision of the data" on the need of U.S. business for private international remailing, and the presence of "little or no reliable information as to the amount of revenues diverted to date by the activities of remailers." 51 Fed. Reg. 21,931 (June 17, 1986).
>
> The Unions filed suit in the district court, seeking declaratory and injunctive relief against enforcement of the international remailing regulation.

Petitioner ACCA was permitted to intervene in the district on the side of defendant U.S. Postal Service pursuant to Rule 24(b), F.R. Civ. P. (permissive intervention). Appendix ("App.") 1a. ACCA's interest was based on those of its members which engage in international remailing, some of which formed "an *ad hoc* group of certain interested ACCA members which drew financial support from ACCA." This group was known as the International Remail Committee in the rulemaking proceedings. Memorandum of Points and Authorities in Support of Air Courier Conference of America's Motion to Intervene, at 2; App. at 3a. ACCA alleged that its members would suffer "irreparable injury" if the rule were vacated. *Id.* at 1-2; App. 3a-4a. It contended that "[r]evocation of 39 C.F.R. § 320.8 [the international remail suspension] would present ACCA's members who engage [in] international remail of letters with the Hobson's choice of foregoing $50 million in sales or face possible civil suits and criminal prosecution under the Private Express Statutes. . . ." *Id.* at 7; App. 7a. It argued that intervention was warranted because the Postal Service would not adequately defend the rule. *Id.* at 10; App. 9a.

ACCA did not participate in any part of the proceedings in the court of appeals. It filed a notice of appearance in that court on February 6, 1990, almost two

months after the court entered its judgment. U. Resp. Opp. at 1-2, n.1.[4]

The administrative record discloses that international remailers have contended that they may lawfully operate under the 1979 "extremely urgent letter" suspension of the PES. 39 CFR 320.6. That rule contains two tests for coverage: a "loss of value" test and a "cost" test. Under the loss of value test, the letter must be delivered within a short, specified period of time after dispatch and the value or usefulness of the letter must be greatly diminished if not delivered within that period. The cost test is satisfied if the amount paid for private carriage is at least $3.00 or twice the applicable U.S. postage for First Class mail, whichever is the greater. The International Remail Committee stated in its comments to the USPS's initial proposal to amend the urgent letter rule that their businesses already met the "cost" and "loss of value" tests (Ad. Rec. at 32, p. 46):

> International remail companies do charge more than twice what the Postal Service would charge for transporting shipments containing multiple envelopes. Much of the items carried are, indeed, demonstrably urgent. As indicated, the Department of Justice apparently agrees.

The December 12, 1985, comments filed by the Department of Justice during the rulemaking fairly summarize the arguable "loophole" in these regulations which was grasped by international remailers to enter this aspect of the courier business (Ad. Rec. at 28, pp. 5, 9-10 (footnotes omitted)):

> American firms use remailers to send bulk mailings to foreign addresses. These bulk mailings typically involve such items as bank statements, periodicals, catalogues, and advertisements, but rarely individual correspondence. Generally, the remailer ships the mail to the foreign postal administration that offers the best combination of speed and price for delivery to the addressee. The postal administration in which the remailer deposits the mail is not necessarily that of the ultimate recipient.
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> * * * *

[4] Because it was a party in the district court, the Solicitor General believes that ACCA "appears to be a proper petitioner." Fed. Resp. Opp. at 6, n.1.

Under the "cost" test, Postal Service regulations allow carriers to make the comparison with Postal Service rates based on an entire shipment of letters if all the letters are "delivered" to the same destination:

> If a single shipment consists of a number of letters that are picked up together and *delivered together to a single destination*, the applicable U.S. postage may be computed for purposes of this paragraph as though the shipment constituted a single letter of the weight of the shipment. (Emphasis added)

39 C.F.R. § 320.6(c). The definition of "delivered" is the crux of the ambiguity that has permitted remailers to flourish by using airmail shipments as "urgent" deliveries of arguable "non-urgent" individual letter items.

For purposes of the suspension of the Private Express Statutes for extremely urgent international mail, the regulations consider letters to be " 'delivered' when they are in the custody of the international or overseas carrier at its last scheduled point of departure from the 48 contiguous states." 39 C.F.R. § 320.6(b)(2). The remailers contend that under the current regulations, even though mail is ultimately destined for a number of different foreign addresses, it is deemed "delivered" when the bundle of consolidated letters arrives at the overseas carrier. Under that reading of the regulations, shipments so delivered meet the cost test if the carrier charges twice the domestic First Class rate based on the aggregate weight of each shipment. By treating the consolidated package as a single letter whose postage is determined by the weight of the entire package,

> remailers can satisfy the cost test and charge a lower rate than if the postage payable were calculated separately for each piece of mail in the package addressed to a different addressee. The Postal Service argues that this practice of the remailers is inconsistent with both the intent and terms of the suspension for extremely urgent mail and proposes revising the regulations to make it clear that the carriers' current practices are prohibited by the Private Express Statutes. Notice, 50 Fed. Reg. at 41,462.

Under the Postal Reorganization Act ("PRA"), the Postal Service may not initiate either civil or criminal court actions.[5] Rather, under 39 U.S.C. 409(d), "[t]he Department of Justice . . . furnish[es] . . . such legal representation as [the Postal Service] may require. . . ." The Department of Justice rejected the Postal Service's requests to sue the remailers under the PES, refusing to accept the Postal Service's view that they failed to qualify for the "extremely urgent letter" suspension. Pet. at 9. Furthermore, the Department has repeatedly stated during the rulemaking proceedings, prior to adoption of the rule suspending the PES for international remailing, that "it will not prosecute remailers or their customers on the basis of current Postal Service regulations." Letter dated May 2, 1986, to Charles D. Hawley, Assistant General Counsel, U.S. Postal Service, from Deputy Assistant Attorney General Charles F. Rule, Ad. Rec. at 106, p. 2; App. 12a. That letter attached a February 26, 1986, letter from the Attorney General to the Postmaster General stating that remailers constituted "lawful private sector competition to the Postal Service," and a letter dated April 2, 1986, from an Assistant Attorney General to a United States Senator stating that "the Department of Justice will not seek to prosecute interna-

[5] Although the basic PES prohibitions are found in the criminal code, the Justice Department sometimes seeks civil injunctions against those who violate them. See, e.g., *U.S. Postal Service v. Brennan*, 574 F.2d 712 (2d Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

tional remailers or their customers on the basis of the current regulations." *Id.*; App. 16a.

In its proposed 1985 regulation, later withdrawn, the Postal Service attempted to overcome the Department of Justice's objections to prosecuting remailers by closing the perceived loopholes in the existing regulations. 50 Fed. Reg. 41,462 (October 10, 1985). The proposed regulations would have narrowly restricted international remailing by (1) making it clear that letters which travel over post routes, even though destined for foreign countries, fell within the monopoly; (2) eliminating the "loss of value" test altogether for international mail, and (3) permitting aggregation for the purposes of meeting the "cost test" only for letters destined for the same ultimate foreign recipient. See comments of Department of Justice, *supra*, at 11-12. It was presumed that, once the proposed regulation were adopted, the Postal Service would again "ask the Department of Justice for authority to enjoin remailers from violating the Private Express Statutes." *Id.* at 2.

Ultimately, the Postal Service reversed itself and proposed to suspend the PES for virtually *all* international remailing.[6] Although the Department of Justice in the end supported the proposed suspension (Ad. Rec. at 114), it made it clear in the second phase of rulemaking that "[t]he Department s[aw] no need for a new rule" because the practice of international remailing, as described above, was legal under current regulations. Letter of Charles F. Rule, *supra*, p. 2, Ad. Rec. at 106; App. 12a.

[6] Under this suspension, international remailers would be free to operate whether or not they fit within the existing "extremely urgent letter" suspension, as interpreted by the Department of Justice. The only prohibition surviving in the final rule was of remailing of letters abroad which were destined for ultimate delivery in the United States. 51 Fed. Reg. at 29,637-638.

ARGUMENT

1. Where, as here, a party intervenes on the side of a government defendant, and the latter declines to seek review in this Court, the intervenor who petitions this Court to review the decision below must establish his own standing. *Diamond v. Charles*, *supra*, 476 U.S. at 63. Even though the petitioner, as a party in the district court, may fall within the class of persons who may seek review on certiorari under Rule 12 of this Court, this alone will not suffice for jurisdictional purposes. *Id.* Although intervenors are considered parties in this Court, ". . . an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Id.* at 68. The petitioner cannot do so here.

2. The first reason why the petitioner is precluded from seeking review is that no case or controversy exists between it and either Union respondents or the Postal Service on the validity of the remail regulation. Because the Postal Service "alone is entitled to create a" regulation suspending the PES, 39 U.S.C. 601(b), only the Postal Service has a "direct stake" in defending the regulation. *Id.* at 65 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)). Had the Postal Service sought review, a justiciable controversy would have existed between it and the Unions, and ACCA, as an intervenor below, would have had the right to be a party in this Court. However, the Postal Service failed to petition for a writ of certiorari, thus "indicat[ing] its acceptance of [the court of appeals'] decision, and its lack of interest in defending its own [regulation]." *Id.* at 63. Accordingly, even though the Service may now choose to support the position taken by ACCA, and its "interest may be adverse to the interests of" the Union respondents, "its failure to invoke [the Court's] jurisdiction leaves the Court without a 'case' or 'controversy' between" the

Union respondents and the U.S. Postal Service. *Id.* at 63-64; see *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 544 (1986) (school board member sued in his official capacity cannot "step into the shoes of the Board" to petition for certiorari when the Board declined to do so).

3. In addition, ACCA lacks standing because it "is not able to assert an injury in fact." 476 U.S. at 65. See *Lujan v. National Wildlife Federation*, —— U.S. ——, 58 USLW 5077, 5080 (June 27, 1990). Here the members of ACCA do not face a threat of criminal prosecution or civil injunctive action, *id.*, because the Department of Justice has stated without qualification "that it will not prosecute remailers or their customers on the basis of current Postal Service regulations." Ad. Rec. at 529, p. 2. The possibility of *future* injury—for example, that officials of the Department of Justice in some future administration may reconsider its position and agree with the Postal Service that international remailing is not sanctioned by the "extremely urgent letter" suspension—will not suffice; such speculative or contingent threats of future harm are not the kind of direct injury which will sustain Article III jurisdiction. *Whitmore v. Arkansas*, —— U.S. ——, 110 S.Ct. 1717, 1724, 109 L.Ed. 2d 135 (1990) (petitioner was denied the right to intervene in state court to appeal the death sentence of another prisoner; "Petitioner's alleged injury is too speculative to invoke the jurisdiction of an Art. III court."); *Hall v. Beals*, 396 U.S. 45, 49 (1969) (contingent threat); *Public Service Comm'n v. Wycoff Co.*, 344 U.S. 237, 244 (1952) (same); *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (threat of future injury); *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 81 (1961) (same); *Pennell v. San Jose*, 485 U.S. 1, 8 (1988) (same); see generally *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Allen*

v. Wright, 468 U.S. 737, 755 (1984); *Valley Forge College v. Americans United*, 454 U.S. 464, 472 (1982).[7]

4. This case is controlled by *Diamond v. Charles*. There, the plaintiffs sued the State of Illinois alleging the unconstitutionality of an Illinois abortion statute. Dr. Diamond, a pediatrician opposed to abortion, intervened on the side of the State to defend the statute. The court of appeals affirmed the grant of a permanent injunction against enforcement of certain of the statutory provisions, and the State did not appeal to this Court. Dr. Diamond did appeal, and this Court noted probable jurisdiction. Thereafter, the Attorney General of the State of Illinois wrote a letter to the Court, stating in part that the State's "interest in this proceeding is identical to that advanced by it in the lower courts and is essentially co-terminous with the position in the issues set forth by the appellants." *Id.* at 61. The Court held that Dr. Diamond had no standing to defend the constitutionality of the statute when the State declined to so do. The Court noted that, had the State appealed, the intervenor would automatically have been a party and could also seek review. "But this ability to ride 'piggyback' on the State's undoubted standing exists only if the State is in fact an appellant before the Court; in the absence of the State in that capacity, there is no case for Diamond to join." *Id.* at 64.

[7] The Unions did not object to ACCA's intervention in the district court. (The Postal Service did object to intervention as of right.) Of course, the standards for permissive intervention are not necessarily the same as the injury requirement of Article III. See *Diamond v. Charles*, *supra*, 476 U.S. at 68. And there was no occasion to raise the issue in the court of appeals against the absent intervenor. Strictly speaking the standing issue did not become material until the Federal respondent chose not to petition for a writ of certiorari. In any event, because the issue is jurisdictional, it cannot be waived, *id.* at 74 (O'Connor, J., concurring), and may be raised after the writ has been granted. See *Bender v. Williamsport Area School Dist.*, *supra*, 475 U.S. at 450-451 (Court raised standing issue *sua sponte*).

The same is true in this case. The controversy below was between the Unions and the Postal Service. ACCA made no claim in its motion to intervene that its members' business practices would change in any way on account of the final rule suspending the PES. It intervened for no purpose other than to defend the Postal Service's regulation under PRA Section 601(b). It asserted the identical defenses, namely, that the Unions had no standing to assert claims under the PES, and that the record on "public interest" under PRA Section 601(b) supported the rule. See ACCA's Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment, and Intervenor's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and in Reply to Plaintiffs' Opposition to Defendant's Motion for Summary Judgment. Indeed, its principal contention in intervening was that the Postal Service, as a competitor of ACCA's members, could not be relied upon vigorously to defend a rule suspending its monopoly over this kind of mail when it was initially intent on imposing the monopoly on ACCA's members. See Memorandum of Points and Authorities in Support of Air Courier Conference of America's Motion to Intervene at 9-10; App. 9a.[8] Obviously ACCA added nothing new in the court of appeals; it did not even file a brief there. Undoubtedly, had the Postal Service chosen to petition for a writ of certiorari, it would have had standing to do so. But the Postal Service having chosen not to seek review, *Diamond v. Charles* teaches that ACCA cannot use the Postal Service' dispute with the Unions as a basis for standing, any more than Dr. Diamond could defend the constitutionality of the Illinois abor-

[8] ACCA stated that "the USPS must be seen as less than an enthusiastic advocate of the Final Rule it adopted and of the remailers who benefit by it." *Id.* at 10; App. 9a.

tion statute—even with the support of the respondent State [9]—in the absence of an appeal by the State.[10]

On remand from the court of appeals, on the basis of a fortified record, the Postal Service may choose to renew its rule waiving the PES for international remail. This outcome will, of course, cause the issue of the adequacy of the current record to support this suspension to become moot. But even though the Postal Service may choose not to reissue the rule, *Diamond* still precludes review because the Postal Service's failure to adopt a rule suspending the PES for international remailers does not threaten ACCA members with immediate injury.[11] In its motion to intervene, ACCA stated (at p. 7) that its members' annual revenues for international remail were $50 million, and that "[r]evocation of 39 C.F.R. § 320.8 [the international remail suspension] would present ACCA's members who engage [in] international remail of letters with the Hobson's choice of foregoing $50 million in sales or force possible civil suits and criminal prosecution under the Private Express Statutes. . . ." But this allegation is meaningless in light of the Department of Justice's blanket refusal to sue or prosecute them or their customers on the basis of existing regulations. And as we showed above, the fear of future litigation is simply not a basis for alleging substantial risk of *present* harm.[12]

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[9] We are informed that the Acting Solicitor General now intends to defend the suspension of the PES in this Court.

[10] Although *Diamond* involved a direct appeal, and not a petition for a writ of certiorari, there is no difference in the application of the controlling principles. Standing is an Article III requirement as applicable to certiorari review as to appeals.

[11] ACCA, an association alleging no injury to itself, has standing only insofar as its current members do. See *Valley Forge College v. Americans United*, *supra*, 454 U.S. at 476-477 n.11, and cases cited there. See also *International Union, UAW v. Brock*, 477 U.S. 274 (1986).

[12] This would be the case even were the Department of Justice totally neutral on the matter. International remailers belonging to

5. While there might seem to be an inconsistency between the Unions' position that they have standing and ACCA does not, any inconsistency is more apparent than real. The deficiency in ACCA's standing is its inability to demonstrate injury in fact, a jurisdictional requirement of Article III. While ACCA did question whether the Unions themselves suffered an injury in fact, both the district court and court of appeals found that this "irreducible minimum" standing requirement was met. Pet. App. at 5a-6a, 30a-31a. Neither ACCA nor the Postal Service appealed from the district court's findings on this point. And the Court granted a writ of certiorari only on the single standing issue presented by the petitioner: "Are postal employees within the 'zone of interest' of the statutes that establish and allow the United States Postal Service to suspend the postal monopoly when 'the public interest requires?'" Pet. at i. See Rule 14.1(a) of this Court ("Only the question set forth in the petition, or fairly included therein, will be considered by this Court.").

More importantly, however, unlike ACCA members, the Unions are faced with a threat of immediate injury by the *total* suspension of the PES for international remailing. If adopted, any and all firms may engage in

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ACCA contended throughout the rulemaking that they currently comply with the requirements of the "extremely urgent letter" suspension. If this is so, they each have a dispositive defense if they are ever sued.

It may be that ACCA fears a private civil action by the Unions to enjoin their businesses. See *American Postal Workers Union v. React Postal Services, Inc.*, 771 F.2d 1375 (10th Cir. 1985) (unions have a private right of action under the PES); but see *American Postal Workers Union, Detroit Local v. Independent Postal Systems of America, Inc.*, 481 F.2d 90 (6th Cir.), cert. granted, 414 U.S. 1110 (1973), cert. dismissed, 415 U.S. 901 (1974) (contra). But even this fear does not constitute a threat of immediate harm, because these companies may advance their assertedly meritorious defenses there. See *Public Service Comm'n v. Wycoff Co.*, *supra*, 344 U.S. at 245 (stating that the plaintiff there wanted to "win any such case before it is commenced.").

this business, whether or not the letters they carry meet existing conditions for carriage out of the mails, as ACCA members (with Department of Justice support) insist that they do. Clearly ACCA does not claim to, and cannot, represent in this litigation those future, potential members of this trade association which may enter the remail industry without complying with cost and urgency restrictions. See authorities on associational standing cited at p. 11 and 14 n.11, above.[13]

Because the record does not disclose that any current ACCA members fail to qualify under the urgent letter rule, or are otherwise threatened with prosecution, we respectfully submit the writ should be dismissed. See *Diamond v. Charles*, *supra*, 476 U.S. at 67 (facts supporting standing must appear in the record); *Bender v. Williamsport Area School Dist.*, *supra*, 475 U.S. at 546 (same). Alternatively, "[g]iven the interlocutory posture of the case", and the Postal Service's willingness to accept the remand of the court of appeals (Fed. Resp. Opp. at 9), we ask that the writ be dismissed as improvidently granted.[14]

[13] As we stated earlier, ACCA never asserted in its motion to intervene that its present members had an interest in being liberated from the "cost" and "loss of value" tests of the "urgent letter" rule.

[14] We offer as an alternative ground for dismissal that ACCA was not a proper intervenor in the district court, for the reasons explained in Justice O'Connor's concurring opinion in *Diamond v. Charles*, 476 U.S. at 71.

CONCLUSION

For these reasons, we ask the Court to grant this motion.

Respectfully submitted,

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July 1990

APPENDIX

APPENDIX

ORDER

HAVING CONSIDERED the Air Courier Conference of America's (ACCA) motion to intervene, memorandum of points and authorities in support thereof, the responses of plaintiff and defendant thereto, and the entire record herein and it appearing to the Court that the motion should be granted, it is this 26 day of February, 1988;

ORDERED that ACCA's motion to intervene be and is hereby granted pursuant to Rule 24(b).

/s/ Charles R. Richey
United States District Judge

AIR COURIER CONFERENCE OF AMERICA'S MOTION TO INTERVENE

The Air Courier Conference of America (ACCA) hereby moves pursuant to Rule 24(a) of the Federal Rules of Civil Procedure to intervene as a matter of right.

The bases and reasons for ACCA's motion are set forth in the attached Supporting Memorandum of Points and Authorities. A Proposed Order is also attached.

Respectfully submitted,

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* * * *

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AIR COURIER CONFERENCE OF AMERCIA'S MOTION TO INTERVENE

I. *INTRODUCTION*

The Air Courier Conference of America (ACCA) has moved under Rule 24(a) of the Federal Rules of Civil Procedure to intervene in this proceeding. ACCA's motion is grounded on the facts that: (1) ACCA and its members' rights may be adversely affected by this lawsuit and (2) the United States Postal Service (USPS or Postal Service) will not adequately protect those rights.

II. *STATEMENT OF FACTS*

ACCA is a trade association including private overnight couriers, which deliver extremely urgent letters domestically and internationally, and international remailers, which pick up foreign bound mail and transport it in bulk to foreign post offices for remailing to foreign destinations. Of ACCA's 180 members, 120 are carriers and those of which engage in remail account for virtually all the private remail business in the United States.

During the two 1985-1986 rulemaking proceedings conducted by the USPS which culminated in the issuance of 39 C.F.R. § 320.8, comments were submitted by the International Remail Committee (Remail Committee) in support of an exemption for international remail of letters from the postal monopoly and the Private Express Statutes. See Comments on the International Remail Committee (December 12, 1985) attached as Exhibit A. The Remail Committee was an *ad hoc* group of certain interested ACCA members which drew financial support from ACCA. Many of the Remail Committee members are still members of ACCA. In addition, Federal Express, DHL, Purolator, Airborne, and United Parcel Service all current ACCA members, and ACCA itself

submitted comments in opposition to the originally proposed rule declaring remail outside the scope of the extremely urgent letter exemption of 39 C.F.R. § 320.6 These comments are attached as Exhibit B.

The members of ACCA engaged in remailing have substantial rights at issue in this proceeding, inasmuch as revocation of 39 C.F.R. § 320.8 as sought by plaintiffs would cause irreparable injury to such remailers. Moreover, because the USPS only grudingly adopted 39 C.F.R. § 320.8 after Congressional and Executive Branch pressure on it to do so, the USPS will not adequately protect the remailers rights.

III. *DISCUSSION*

Rule 24(a) provides that:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Judge Flannery in *Grumman v. Flexible Corp.*, 102 F.R.D. 36, 38 (D.C. D.C. 1983) recently repeated the legal premise of intervention under Rule 24:

> The right of intervention conferred by Rule 24 implements the basic jurisprudential assumption that the interest of justice is best served when all the parties with a real stake in a controversy are afforded an opportunity to be heard.

Grumman, supra, quoting Hodgson v. United Mine Workers, 473 F.2d 118, 130 (D.C. Cir. 1972).

The Courts have held that motions to intervene as a matter of right under Rule 24(a) will be granted if they

satisfy the following four requirements: (1) application for intervention must be timely; (2) the applicant must show an interest in the property or transaction that is the subject of the action; (3) disposition of the action may impair or impede the applicant's ability to protect that interest; (4) the existing parties to the litigation do not adequately represent the intervenor's interests. *Natural Resources Defense Council v. Costle*, 561 F.2d 904 (D.C. Cir. 1977) (*Natural Resources*).

1. *ACCA's Application For Intervention is Timely*

The key to determining timeliness is whether the applicant delayed its Motion to Intervene pursuant to Rule 24(a) sufficiently to prejudice the existing parties to the litigation. *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1073 (5th Cir. 1970). Intervention will not be denied if it will not substantially delay trial. Moreover timeliness is to be determined by all the circumstances. *Natural Resources, supra* 561 F.2d at 907.

ACCA's intervention would not delay or prejudice the adjudication of the right of the other parties to this lawsuit. USPS's answer was filed on January 25, 1988. The discovery and pretrial practice to date has been minimal.[1] No trial date has been set. Accordingly, ACCA's instant Motion to Intervene is timely.

2. *ACCA And Its Members Have An Interest in the Subject Matter of This Action*

As Judge Gasch stated in *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 99 F.R.D. 607 (D.C. D.C. 1983) (*NRDC*):

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[1] Apart from the answer to the complaint, the sum and substance of the activities in this case have been the service of a set of as yet unanswered interrogatories and document requests by plaintiffs on December 18, 1988 and the filing of defendant's Motion for a Protective Order against plaintiffs' discovery on January 15, 1988.

> The first consideration the interest requirement has been interpreted in broad terms, and the United States Court of Appeals for the District of Columbia has stated that "the 'interest test' is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."

99 F.R.D. at 609, *quoting Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981).

ACCA and those of its members which engage in international remail of letters pursuant to the exemption to the Private Express Statutes embodied in 39 C.F.R. § 320.8 have a direct interest in the subject matter of this lawsuit. That interest is of record in the Postal Services's rulemaking which resulted in promulgation of the § 320.8 exemption. *See* Exhibit A. These comments by the Remail Committee, ACCA and its current members were solicited in the originally proposed rulemaking to "clarify" (narrow) the suspension for extremely urgent letters on October 10, 1985, 50 *Federal Register* 41462. It is the comments in opposition to USPS original October 10, 1985 proposal that the Postal Service adoption in support of the Final Rule issued on August 20, 1986, 51 *Federal Register* 29636.

Judge Gasch's finding in *NRDC*, where trade associations sought to intervene in support of certain EPA regulations, is equally apt here:

> If plaintiffs succeed in this case, these regulatory decisions, which are obviously in the intervenor's interests, will be set aside. Thus the intervenors can be said to have a substantial and direct interest in the subject of this litigation.

NRDC, supra, 49 F.R.D. at 609.

Clearly ACCA's members' support of the rule adopted and embodied by 39 C.F.R. § 320.8 reflect no less a substantial and direct interest in this action seeking revoca-

tion of the Rule 320.8 adopted by the Postal Service than those of the intervenors in NRDC.

3. *Disposition of This Action May Adversely Affect ACCA's Interests*

ACCA and its remail members have a direct interest in the outcome of this action. ACCA's remail members conduct a substantial volume of business pursuant to the 39 C.F.R. § 320.8 the rule at issue. Indeed, ACCA estimates roughly that its members account for virtually all private international remail of letters under the Rule. ACCA's counsel's rough estimate is that its members total international remail of letters amounts to approximately 3500 tons which amount to estimated total sales of over $50 million. Although substantial in terms of sales by ACCA members and even as a percentage of USPS's outbound international letter traffic (roughly one third) these figures pale in the context of USPS's total revenues of $29 billion in fiscal year 1986.

Revocation of 39 C.F.R. § 320.8 would present ACCA's members who engage international remail of letters with the Hobson's choice of foregoing $50 million in sales or face possible civil suits and criminal prosecution under the Private Express Statutes, 39 U.S.C. §§ 601-606 and 18 U.S.C. §§ 1693-1699, 1724.

ACCA's intervention as a representative of the interests of the remail industry is appropriate. *See NRDC, supra.* In that case a number of trade associations were permitted to intervene as defendants as a matter of right.

In short, ACCA and its members have no less an interest in the subject matter of this action than the plaintiffs who seek revocation of § 320.8. Indeed revocation of § 320.8 would cause immediate and irreparable injury to the international remail industry.

4. *ACCA And Its Members' Interests Are Not Represented By Any of the Parties*

As Judge Gasch said in *NRDC:*

> The . . . final part of the test for intervention as of right concerns the adequacy of representation of the intervenors interests by existing parties. *Intervenors have only the minimal burden* of showing that representation of their interest by existing parties *may be* inadequate.

NRDC, supra 99 F.R.D. at 610 (emphasis added).

The interests of ACCA and its international remail members who operate pursuant to Rule 320.8 are not adequately represented by any of the parties of this lawsuit. Obviously, the plaintiffs, who seek revocation of Rule 320.8 which ACCA and its members support and pursuant to which such members engage in international remail of letters, have interests directly at odds with ACCA and its members.

The Postal Service also does not adequately represent ACCA and its members' interests. In *NRDC* the court recognized that although "facially, it would seem that the EPA and the intervenors have the same interest" the interests of the intervenors and the government agency whose actions they sought to uphold "cannot always be expected to coincide." *NRDC, supra* 99 F.R.D. at 610. Judge Gasch noted that the intervenors represented a narrower interest than the agency and it was sufficient that their interests might at some stage of the proceedings; that they would differ on procedures; or, citing *Natural Resources, supra,* that they might disagree on the timing of the promulgation of regulations pursuant to a settlement. *Id.* The potential problems that were found to meet the "minimal burden" in *NRDC* are far more immediate in this case.

First, as originally proposed by the Postal Service on October 10, 1985, the proposed rule would have narrowed

the existing administrative exception to the postal monopoly so as to explicitly prohibit International Remail. It was only after substantial pressure was brought to bear on the Postal Service by the executive branch that USPS issued the Final Rule on August 20, 1986 specifically suspending the operation of 39 U.S.C. § 601(a)(1)-(6) and 39 C.F.R. § 310.2(b)(1)-(6). That pressure included comments from the United States Department of Justice (December 12, 1985), attached hereto as Exhibit C. The substance of the Postal Service's original proposal and the degree and scope of participation that was necessary to reverse that proposal to result in the Final Rule bespeaks the Postal Service's reluctance to adopt the Final Rule it now finds itself defending.

Second, this case involves the unusual situation where the rulemaking authority lies with a governmental agency which is an actual competitor of the industry affected by its rules. The Postal Service competes head-to-head with the remailers. Quite apart from the competition policy and antitrust concerns that are inherent where a competitor seeks to regulate its competition, the competition between the remailers and the Postal Service makes their respective interests self-evidently divergent.

Under the circumstances, the USPS must be seen as less than an enthusiastic advocate of the Final Rule it adopted and of the remailers who benefit by it. Accordingly, ACCA and its members, who are the most directly affected by the Final Rule challenged by the plaintiff unions, cannot rely upon the Postal Service to adequately represent their interests and should therefore be permitted to intervene.

IV. *CONCLUSION*

For the reasons stated ACCA respectfully requests this court to permit ACCA to intervene in this proceeding.

Dated: January 29, 1988

Respectfully submitted,

/s/ L. Peter Farkas
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[Note: Exhibits are omitted from this appendix.]

[SEAL]

U.S. Department of Justice
Antitrust Division

Office of the Assistant Attorney General

Washington, D.C. 20530

May 2, 1986

Charles D. Hawley, Esquire
Assistant General Counsel
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1100

Re: Restrictions on Private Carriage of Letters; Withdrawal of Proposed Rules; Advance Notice of Proposed Rulemaking and Request for Information

Dear Mr. Hawley:

I am writing in response to your March 18, 1986 letter to the Department of Justice ("Department") requesting information that might be considered by the Postal Service in fashioning a suspension of the Private Express Statutes for international remail services. I understand that an identical letter has been sent to all parties that filed comments in the remail rulemaking.[1]

Pursuant to the March 4, 1986 statement by John McKean, Chairman of the Board of Governors of the Postal Service ("McKean Statement"), the Postal Service was ordered to withdraw the previously proposed

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[1] Restrictions on Private Carriage of Letters; Withdrawal of Proposed Rules; Advance Notice of Proposed Rulemaking and Request for Information, 51 Fed. Reg. 9852 (March 21, 1986) ("Notice").

rules on which we and others commented,[2] and to initiate a new rulemaking to "preserve the benefits of desirable competition between the Postal Service and private companies."[3] The letter and Notice represent that the information requested is needed "as a basis for proposing a new suspension of the [Private Express] Statutes" and solicit "views as to the scope of a suspension which will best serve the relevant interests" and "specific language for implementing regulations."[4]

The Department sees no need for a new rule. As the Attorney General has stated, international remail represents "lawful private sector competition to the Postal Service."[5] Moreover, the Department has indicated that it will not prosecute remailers or their customers on the basis of current Postal Service regulations.[6] Under these circumstances, a protracted rulemaking will only serve to raise uncertainty as to the legal status of lawful private sector services that numerous executive agencies and the Board of Governors of the Postal Service find beneficial to consumers.

Furthermore, even if a new rule were necessary to clarify that international remail is lawful, the com-

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[2] Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters; 50 Fed Reg. 41462 (October 10, 1985); *See also* Comments of the United States Department of Justice. In the Matter of Restrictions on Private Carriage of Letters; Proposed Clarification and Modification of Definition and of Regulations on Extremely Urgent Letters, December 12, 1985 ("Department Comments").

[3] Notice, 51 Fed. Reg. at 9853.

[4] Notice, 51 Fed. Reg. at 9852.

[5] *See* Letter from Attorney General Edwin Meese to Postmaser General Albert V. Casey, February 26, 1986 (copy attached).

[6] *See* Letter from Assistant Attorney General John R. Bolton to Senator Alfonse D'Amato, April 2, 1986 (copy attached).

ments filed in the earlier remail proceeding and the Postal Service's own internal reports provide an ample record on which to base any rule that the Postal Service deems necessary to "remove the cloud" over remail that it sees under current regulations.[7] The information request and the accompanying procedural schedule will only delay resolution of this matter.

In sum, the Postal Service's conduct of the remail proceeding may reflect a fundamental reluctance to accept the benefits of marketplace competition, contrary to the expressed mandate of the Board of Governors:

> The Board of Governors does not believe that any attempt to suppress this kind of competition would advance the long-term objectives of the Postal Reorganization Act or otherwise enhance the welfare of our customers and the American people.[8]

Consistent with this policy pronouncement, and the policy of this Administration to foster and promote private sector competition in international mail, we strongly urge the Postal Service to abandon the remail proceeding. Alternatively, the Postal Service should resolve the proceeding expeditiously on the basis of the existing record so that the benefits of private sector competition may continue to be enjoyed by consumers of international mail services.

Please include this document in the public file of this proceeding.

Sincerely,

/s/ Charles F. Rule
CHARLES F. RULE
Deputy Assistant Attorney General
Antitrust Division

Enclosures

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[7] *Id.* at 51 Fed. Reg. 9853. *See generally* Department Comments at 19-22.

[8] *See* Notice, 51 Fed. Reg. at 9853. *See also* Department Comments at 19-22.

[SEAL]

OFFICE OF THE ATTORNEY GENERAL
Washington, D.C. 20530

26 February 1986

The Honorable Albert V. Casey
Postmaster General
United States Postal Service
475 L'Enfant Plaza, S.W., Room 10022
Washington, D.C. 20260-1000

Dear Mr. Postmaster:

I understand that on 3 March 1986, the Board of Governors of the United States Postal Service will consider proposed rules that, if adopted, will materially and adversely affect the ability of remail services to compete for international mail traffic. Our Antitrust Division filed comments with you on 12 December 1985, opposing these proposed rules. I would like to reiterate the concerns of this Department about the effect of the proposed rules on competition and consumer welfare.

As the Antitrust Division has explained, there are significant public benefits from lawful private sector competition in the provision of international postal services. Remailers have been able to offer service to United States businesses competing abroad at costs and terms that are apparently viewed by users as better than those offered by the Postal Service. I understand that competition from remailers has forced the Postal Service to introduce new international services. By stifling lawful private sector competition, the proposed regulations will undermine economic efficiency and will inhibit Postal Service incentives to innovate and to price its international services competitively—all to the detriment of consumer welfare.

Given the Administration's policy in favor of competition and against unnecessary regulation, I urge you to

follow the recommendation filed by our Antitrust Division and not promulgate the proposed rules. I understand that these same issues will be relevant to Administration review of the 1984 Universal Postal Union Convention, and I hope the Convention will be submitted shortly for Administrative review. By copy of this letter, I am informing the remaining members of the Board of our position on this matter.

Sincerely,

/s/ Edwin Meese III
EDWIN MEESE III
Attorney General

cc: Members of the Board of Governors,
United States Postal Service

[SEAL]

U.S. Department of Justice
Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

02 Apr 1986

Honorable Alfonse D'Amato
United States Senate
Washington, D.C. 20510

Dear Senator D'Amato:

I am writing in response to your February 13, 1986 letter to Attorney General Meese. Your letter seeks written confirmation from the Department of Justice that international remailers "are not acting illegally" under current Postal Service regulations.

I am enclosing for your information a letter from the Attorney General to Postmaster General Casey that indicates our view that remailers currently provide "lawful private sector competition" to the Postal Service. I also enclose a March 4, 1985 Statement of John R. McKean, who is the chairman of the Postal Service Board of Governors. That statement indicates that the Board of Governors views competition from remailers as being in the public interest. That statement also indicates that the Board of Governors has ordered the Postal Service to commence a rulemaking proceeding to "remove the cloud" over remailing that, in their opinion, is created by current Postal Service regulations.

Under these circumstances, you may be assured that the Department of Justice will not seek to prosecute international remailers or their customers on the basis of the current regulations.

We hope that you find this information useful in clarifying the lawfulness of international remail and in minimizing the adverse effects that the current situation has had on your remailer constituents.

Sincerely,

/s/ John R. Bolton
JOHN R. BOLTON
Assistant Attorney General

Enclosures

cc: Louis A. Cox, Esquire
General Counsel
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